Supreme Court, U.S.
FILED

93-1267 DEC 28 1993

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1993

MICHAEL B. KING,

Petitioner,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF GEORGIA, et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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37 pp

QUESTION PRESENTED

What is the test for determining "good cause" under Federal Rule of Civil Procedure 26(c)?

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JURISDICTION

Jurisdiction is invoked pursuant to Section 1254(1) of Title 28 of the United States Code. Judgment was entered on August 18, 1993, and the petition for a rehearing was denied on September 29, 1993.

FEDERAL RULE OF CIVIL PROCEDURE

Rule 26(c) provides:

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

STATEMENT OF THE CASE

On July 26, 1991, the petitioner filed his complaint pursuant to 42 U.S.C. §§ 1981, 1983 and 1988, alleging that the respondents had arbitrarily and discriminatorily denied him admission to Georgia State University College of Law.

During the time allowed for discovery of information, the petitioner served respondents Marjorie Knowles and Raytheon M. Rawls with notice of their depositions. The respondents failed to appear for their depositions. The petitioner requested the respondents to give him several dates when they could be available for their depositions. The respondents provided the petitioner with one date, but the petitioner was scheduled to appear in court for a trial on that date.

When the petitioner was unable to depose the respondents on the date provided by them, they move for a protective order, barring the taking of their depositions. The

district court granted the respondents' motion, and the appeals court affirmed the decision of the district court.

ARGUMENT

This Court has not addressed the issue of what constitutes "good cause" for protecting a party against the taking of his deposition, nor has this court suggested a test to use in determining the existence of "good cause." These matters have been left to the discretion of the lower courts.

The majority of the circuits hold that there is "good cause" to bar the taking of a deposition only when "extraordinary circumstances" exists in a particular case. Salter v. Upjohn Co., 593 F. 2d. 649 (5th Cir. 1979); Marrese v. American Academy of Orthopaedic Surgeons, 726 F. 2d. 1150 (7th Cir. 1984). These circuits apply a "balancing test" to determine whether the needs of the party seeking the deposition outweigh any harm the other party may suffer. Id.

Failure of the trial court to balance the interests of the parties is an abuse of its discretion in these circuits. Id.

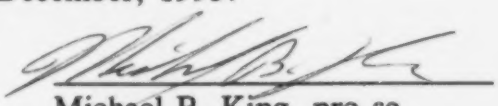
The Eleventh Circuit, however, does not apply a standard for determining whether "good cause" exists in a particular case. The Eleventh Circuit will bar the taking of a deposition on a showing of "mere inconvenience" without considering the interests of the party seeking the deposition. Such judicial conduct deprives that party of a fair opportunity to develop and prepare his case, and said party will probably lose his action at the summary judgment stage of the proceedings.

Since the judicial conduct of the Eleventh Circuit deviates so far from that of other circuits, a review of its decision by this Court is warranted to correct such conduct, and to protect the rights of parties seeking to discover information by deposition.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

This 28th day of December, 1993.



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CERTIFICATE OF SERVICE

I certify that I have this day served the within and foregoing Petition for Writ of Certiorari, by first class mail, upon:

Dennis Dunn
Attorney for Respondents
132 State Judicial Bldg.
Atlanta, GA 30334

This 31st day of January, 1994.

Michael B. King

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 92-9049

MICHAEL B. KING. Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM
OF GEORGIA, et al., Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING
(September 29, 1993)

BEFORE: ANDERSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Michael B. King is denied.

ENTERED FOR THE COURT:

[Signed]
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-9049
Non-Argument Calendar

D.C. Docket No. 1:91-cv-1770

MICHAEL B. KING,

Plaintiff-Appellant,

versus

BOARD OF REGENTS OF
THE UNIVERSITY SYSTEM
OF GEORGIA, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

(August 19, 1993)

Before ANDERSON, BIRCH and DUBINA, Circuit Judges.

PET CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiff-appellant."

Judgment Entered: August 19, 1993

For the Court: Miguel J. Cortez, Clerk

By: [Signed]
Deputy Clerk

ISSUED AS MANDATE: October 27, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL B. KING,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
vs.	:	1:91-cv-1770-HTW
	:	
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et. al.,	:	
	:	
Defendants	:	

ORDER OF COURT

This matter is currently before this court on the defendants' motion for summary judgment, the plaintiff's second motion to extend discovery, the plaintiff's second motion to extend the time to respond to the defendants' motion for summary judgment, and the plaintiff's motion for reconsideration of this court's Order of February, 6, 1992.

FACTS

Plaintiff, Michael B. King, initially enrolled in Georgia State University Law School, (hereinafter, the "Law School"), in September, 1984. In the spring of 1986, the Law School dismissed King, stating that King had failed to maintain the Law School's required grade point average. King petitioned the Committee on Student Affairs for readmission, and the Committee granted his petition. King remained on probation for three quarters; his grade point average, however, not only failed to improve, but declined. The Law School accordingly did not permit King to continue his legal studies at Georgia State.

King then petitioned the Committee on Student Affairs for permission to continue his legal studies at the Law School; the Committee this time denied his application. King then appealed the Committee's decision to Dean Marjorie

Knowles, Vice President Brewer, Acting President Suttles, and the Board of Regents. All denied King's request.

After this denial, King filed his first law suit against the Law School in March, 1988; in that action plaintiff alleged the same causes of action against defendants as those plaintiff has submitted in the instant case. The district court, (n an Order issued by Judge Hall), dismissed King's complaint, and the Eleventh Circuit Court of Appeals affirmed in a per curiam opinion. The United States Supreme Court denied King's petition for certiorari.

In the summer of 1989, King again sought readmission to the Law School, but he submitted his application too late for consideration for the class of 1989-1990. During the spring of 1999, however, the Admissions Committee considered King's application for admission to the class of 1990-1991. After review, the Admissions Committee denied King's application for admission.

King then appealed the decision of the Admissions Committee Dean Knowles, who reviewed the decision for indications of arbitrariness, discrimination, or any other unlawful rationale in denying King's application for entry to the Law School. Knowles upheld the decision of the Admissions Committee, and King then appealed her decision to Dr. Fred Massey, acting Vice President for Academic Affairs. Dr. Massey also upheld the Committee's decision, and King next appealed to President Palms; Palms again upheld the Committee's decision. King finally appealed the decision to the Board of Regents of the University System, who, acting as a body, reviewed the record and various decisions, and then upheld the decision to deny admission to the Law School to King.

DISCUSSION

a. Plaintiff's Motion for Reconsideration:

This matter has already been before this court on a motion from plaintiff to compel deposition, a motion from plaintiff to extend the time to respond to the defendant's motion for summary judgment. This matter has also been before this court on motions from defendants for a protective order, and on motions from defendants to stay discovery.

The court entered an Order in this matter on February 6, 1992, which denied the motion from plaintiff to compel deposition, denied the motion from plaintiff to extend discovery, and denied the motion from plaintiff to extend the time to respond to the defendant's motion for summary judgment. Plaintiff now asks that this court reconsider that Order, but offers this court no compelling reason why this court should alter the substance of the Order. This court accordingly DENIES plaintiff's motion for reconsideration.

B. Plaintiff's Second Motion to Extend Discovery, and Plaintiff's Second Motion to extend the Time to Respond to the Defendants' Motion for Summary Judgment:

This matter is now before this court on new motions by plaintiff not only to extend discovery in this matter, but to extend plaintiff's time to respond to the defendant's motion for summary judgment. This court has already denied these motions by previous Order, and has declined, within the framework of this Order, to reconsider that Order. Plaintiff, moreover, has offered this court no new or compelling reason why this court should grant these motions on this occasion. This court accordingly DENIES plaintiff's second motion to extend discovery, and plaintiff's second motion to extend the time to respond to the defendants' motion for summary judgment.

C. Defendants' Motion for Summary Judgment:

This matter is finally before this court on the defendant's motion for summary judgment. Although

defendants offer three grounds why this court should grant it motion for summary judgment, this court will consider only one, namely, defendants' contention that plaintiff's claims are mere conclusory allegations without substantiation or factual support.

(a) Summary Judgment Standard:

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Carlin Communication, Inc. v. Southern Bell Tel & Tel. Co., 802 F.2d 1352, 1356 (11th Cir. 1986); Warrior Tombigbee Transportation Co., Inc. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983); Fed.R.Civ.P. 56(c). To determine if the moving party meets its burden of proof, the court must view all evidence and inferences to be drawn from it in a light most favorable to the party opposing the motion. Carlin

Communication, 802 F.2d at 1356; Sweat v. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983).

The Supreme Court recently addressed the burdens of proof which each party must carry on a motion for summary judgment and stated that:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, L.Ed.2d 265 (1986). The nonmoving party is

required to identify specific facts which demonstrate that there is a genuine issue for trial and may not rest on the allegations or denials in its pleading. Celotex, 106 S.Ct. at 2553, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). However, in order to survive defendant's motion, plaintiff need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Anderson, 106 S.Ct. at 2414-15.

Defendants now contend that this court should grant its current motion for summary judgment, since King's current motion fails to alert defendants, with any specificity, as to the precise nature of his claims against them. This court agrees. This court has reviewed King's complaint, and notes that King has asserted no facts in support of his allegations of discrimination. King's complaint instead merely states that the law school denied his application for

admission; the complaint then asserts, in conclusory fashion, that the Law School's actions were discriminatory.

As the Eleventh Circuit stated in Peppers v. Coates, 887 F.2d 1493, 1498 (11th Cir. 1989), conclusory allegations do not suffice:

> [W]hen a motion for summary judgment is made and supported according to Rule 56, the nonmoving party's response must set forth specific facts showing a genuine issue for trial. Fed.R.Civ.P. 56(e). If the party's response consists of nothing more than a repetition of his conclusory allegations, the district court must enter summary judgment in the moving party's favor. (Citation omitted).

In this case, of course, plaintiff has failed to submit to this court any response to defendant's summary judgment motion; plaintiff's case, therefor, rests entirely on the conclusory, unsupported allegations of this complaint. Defendants, by

contrast, have submitted affidavits to this court which rebut the assertions found in King's complaint.

In this court's view, summary judgment in this matter is appropriate, especially where, as here, King has presented no evidence to this court to sustain his contentions. This court, therefore, after due consideration, GRANTS defendants' motion for summary judgment and DIRECTS the clerk of court to DISMISS this case.

SO ORDERED, this 9th day of September, 1992.

HORACE T. WARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL B. KING	:	
	:	CIVIL ACTION
vs.	:	
	:	1:01-cv-1770-HTW
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.	:	

JUDGMENT

This action having come before the court, Honorable Horace T. Ward, United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted defendants' motion, it is

Ordered and Adjudged that the plaintiff recover nothing, that his complaint be, and the same hereby is, **dismissed,** and that the defendants recover of the plaintiff their costs of action.

Dated at Atlanta, Georgia, this 14th day of September 1992.

LUTHER D. THOMAS, CLERK

By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL B. KING, Plaintiff	:	CIVIL ACTION
vs.	:	1:91-cv-1770-HTW
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al., Defendants	:	

ORDER OF COURT

This matter is before this court on plaintiff's motion to compel deposition, plaintiff's motion to extend discovery and plaintiff's motion to extend the time to respond to defendants' motion for summary judgment. This matter is also before this court on defendants' first and second motions for a protective Order and to stay discovery.

FACTS

Plaintiff in this matter has filed a complaint challenging defendants' denial of his application for readmission to the Georgia State University School of Law, (hereinafter "law school"). In an earlier suit raising the same issues as those arising in the instant matter, plaintiff challenged his original dismissal from the law school. King v. Board of Regents, Civil action No. 1:88-cv-570-RHH, Order of Hall, J., (January 19, 1990), aff'd, 925 F.2d 1475, (11th Cir. 1991). cert. den., 112 S.Ct. 82 (1991). In that case, Judge Hall granted the defendants' motion for summary judgment, thereby dismissing plaintiff's lawsuit.

Plaintiff initially enrolled in the law school in September, 1984. In the spring of 1986, the law school dismissed plaintiff for his failure to maintain the requisite grade point average. Plaintiff subsequently petitioned the Committee on Student Affairs for readmission, and the

Committee granted his request. Plaintiff remained on academic probation, however, for three quarters, and during that period, his grade point average continued to drop. The law school consequently refused to permit plaintiff to continue his matriculation at the school.

Plaintiff then petitioned the Committee on Student Affairs for the right to continue his legal education at the law school, and the Committee denied his application. He then appealed the Committee's decision to Dean Marjorie Knowles, Vice-President Brewer, Acting President Suttles, and the Board of Regents. All denied his appeal.

Following that denial, plaintiff filed his first lawsuit against the school in March, 1988, alleging the same causes of action as he now alleges in his instant complaint. The court dismissed that lawsuit by granting the defendants' motion for summary judgment, and on appeal the Eleventh

Circuit affirmed. The United States Supreme Court denied plaintiff's petitions for certiorari and rehearing.

In 1989, plaintiff once again sought admission to the law school, but applied too late for consideration for the class of 1989-90. The Admissions Committee, however, considered plaintiff's application in the spring of 1990 for admission to the class of 1990-91, but nonetheless denied plaintiff admission.

Plaintiff then appealed the Admission Committee's decision to Dean Knowles, Dean of the Law School. Knowles upheld the Committee's decision, stating that she found no indication of arbitrariness, discrimination or other unlawful rationale in the Committee's decision to deny plaintiff's entry to the law school. Plaintiff then appealed Knowles' decision to Dr. Fred Massey, Acting Vice-President for Academic Affairs; Massey upheld the decisions of both Knowles and the Committee.

King subsequently appealed Massey's determination to President Palms; Palms again upheld the decision. Plaintiff finally took his appeal to the Board of Regents of the University System, who, acting as a body, evaluated the record and then upheld the Committee's determination. In March, 1988, plaintiff filed a complaint in this court challenging the decision, and, as already noted, Judge Hall dismissed the case by granting defendants' motion for summary judgment. In 1991, plaintiff filed another complaint in this court, again challenging the law school's decision to deny his application for readmission.[1]

Plaintiff has now submitted to this court not only a motion to compel defendants' deposition, but a motion to extend discovery and a motion to extend the time to respond to defendants' motion for summary judgment. Defendants,

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[1] In this lawsuit, certain of the defendants differ from those named in the original suit.,

by contrast, have filed a first and second motion for protective Order and to stay discovery.

Defendants now asset that plaintiff "is unwilling to cooperate in the usual attorney-to-attorney cooperative spirit." This court has carefully reviewed plaintiff's history of litigation in this court, and notes that the prior litigation involved an extensive production of documents on the same issue as that alleged in the instant case.

CONCLUSION

This court also notes that plaintiff has asked this court to compel defendants' deposition for January 27, 1992. Since that date has not passed, plaintiff's motion to compel deposition becomes moot, and this court accordingly DENIES that motion as MOOT. This court also DENIES plaintiff's motion to extend discovery and motion to extend the time to respond to defendants' motion for summary judgment. This

court also GRANTs defendants' first and second motions for a protective Order and to stay discovery.

At this stage, therefore, this court awaits plaintiff's response to defendants' motion for summary judgment.

SO ORDERED, this 5th day of February, 1992.

HORACE T. WARD
UNITED STATES DISTRICT JUDGE